IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

Dr.Gurcharan Singh vs. Nagar Parishad, Sriganganagar & Ors.

(D.B.Special Appeal No.894/1995)

Date of Judgment:- 11th October,2006.

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE JUSTICE SHRI MOHAMMAD RAFIQ

REPORTABLE

Mr.B.L.Purohit }
Mr.J.L.Purohit } Advocates for appellant.
Mr.Rameshwar Dave,Dy.Government Advocate for respondent nos. 1 to 3.
Mr.R.S.Saluja,Advocate for respondent no.4.

BY THE COURT:-(PER HON'BLE MOHAMMAD RAFIQ),J.

This special appeal is directed against the judgment dated 9.10.1995 passed by learned single Judge dismissing thereby writ petition preferred by present appellant. In the writ petition, the appellant had prayed for quashment of the order dated 27.1.1978 whereby the Government approved of lease of a strip of land in favour of respondent No.4 Shyam Lal for 99 years by Municipal Council, Sriganganagar .

Facts of the matter as disclosed in the memorandum of writ petition are that the appellant constructed a house on plot No.1127 situated in old Abadi, Kachchi Diggi, Ward No.21 Sriganganagar. Respondent No.4 had his house adjacent to the aforesaid house of appellant on its eastern side. There was however a small piece of land measuring 627 sq. feet on east-southern side of the aforesaid plot of appellant. A site plan of the land in dispute indicating the location of the two houses has been placed on record as Exhibit-1. With the help of site-plan, the appellant contends that the disputed strip of land form integral part of his plot No.1127 to make it rectangular in shape. Respondent No.4 however firstly made an unauthorized and illegal encroachment over the said strip of land marked 'X' in Exhibit-1 and then started making efforts to get it leased out to him for 99 years. Appellant however as a law abiding citizen approached Municipal Council, Sriganganagar for purchase of the disputed land on 23.12.1962. The then Administrator Municipal Council, Sriganganagar examined respective claims of both the parties and inspected the site on 22.7.1963. He thereupon directed for removal of unauthorized encroachment

made by respondent No.4 and for auctioning this strip of land. A copy of the order dated 22.7.1963 has been placed on record to substantiate this. It is alleged that respondent No.4 manipulated to avoid compliance of the aforesaid order and with his persistent efforts ultimately succeeded in getting a resolution passed from the Municipal Council on 30.6.1965 proposing to lease out the aforesaid strip of land in favour of respondent No.4 for 99 years after he had withdrawn the civil suit filed on the subject and paid a sum of Rs. 50/- as cost of litigation. It was however imperative for the Municipal Council to seek previous sanction of the State Government for grant of any lease as per requirement of section 80 of the Rajasthan Municipalities Act, 1959 (for short 'Act of 1959'). When the Municipal Council, Sriganganagar sent such proposal to the Government, it declined to sanction the grant of lease in favour of respondent No.4 vide order dated 17.1.1966. According to the appellant, the Municipal Council, Sriganganagar ought to have immediately put the disputed strip of land to auction after receipt of Government order dated 17.1.1966. The respondent No.4 however again succeeded in getting the proposal re-

submitted to the Government by communication of the Municipal Council dated 1.5.1967. The State Government by its order dated 26.9.1967 again reiterated its earlier stand and rejected the proposal for leasing out land in favour of respondent No.4 and directed it to be auctioned. When respondent No.4 still persisted in making representations at various levels, the State Government finally by detailed order passed on 5.1.1971 again reiterated its earlier order and wrote to the Municipal Council, Sriganganagar that there are already rules regarding sale of strip of land. According to such rules, if more than one person desire to purchase any strip of land, then sale should be made only by way of auction. The Municipal Council, therefore, was directed to put the land in question to auction.

According to the appellant, order dated 5.1.1971 was a final order passed by State Government in terms of the requirement of section 80(2) of the Act of 1959. In spite of repeated efforts of the appellant however the Municipal Council did not take steps to make compliance of aforesaid

Government order. In the meantime, the respondent No.4 still persisted in making efforts to win over the authorities in his favour and ultimately succeeded in getting order dated 27.1.1978 passed from the Government in the Local Self Department thereby sanctioning the lease of the disputed land in favour of the respondent No.4 for a period of 99 years. This order was passed without any notice to the appellant and in utter ignorance of the previous repeated orders passed by the Government refusing to accord such sanction. Order dated 27.1.1978 does not make any mention of the previous rejection orders and the direction to the Municipal Council for putting the land to auction. When the appellant came to know about this order, he through his counsel immediately filed a review petition on 28.2.1978 before the Government . He was called for personal hearing on 14.4.1978 but no hearing on that date was given and the matter was adjourned to 4.5.1978 on which date also hearing did not take place and the respondents did not communicate any further date of hearing to the appellant. In the meantime, the respondent No.4 started raising construction over the disputed land and having completed the

boundary wall was now proceeding to construct the house. It was at this stage that the appellant preferred his earlier writ petition namely S.B.Civil Writ Petition No.473/1978. This court by its order dated 22.8.1978 passed in the said writ petition directed the parties to maintain status-quo. The writ petition was finally disposed of by judgment dated 19.12.1984 with the direction to the Government to dispose of the review petition dated 27.7.1978 within six months and parties were directed to maintain status-quo till disposal of the aforesaid review petition.

It was contended that the State Government had no jurisdiction to pass the order dated 27.1.1978. According to rule 30 of Rajasthan Municipal (Disposal of Urban Land) Rules, 1974 (for short 'Rules of 1974') previous permission for every sale or disposal of urban land from the Government was necessary where the value of land exceeds Rs. 1,00,000/-. In these circumstances, the appellant submitted an application to the respondent on 24.8.1985 with the certified copy of the judgment dated 19.12.1984 and prayed that his review petition may be decided after providing him an opportunity of hearing.

Nothing was however done at the end of the respondents. It was in these circumstances that the appellant filed another writ petition on 12.5.1986 with the prayer that the impugned order dated 27.1.1978 be quashed and set-aside and the respondent No.4 be restrained from making construction over the plot in question and further that the Government and the Municipal Council be directed to allot the said strip of land by auction to the highest bidder.

The aforesaid writ petition was contested by the Government as also by the respondent No.4. While the Government did not file any reply to the writ petition, the respondent No.4 in his reply contested the matter and contended that the sole grievance with which the present writ petition has been filed by the appellant was about failure of the Government to decide his review petition. The said review petition had already been rejected by order of the Government dated 4.10.1978 but this order was not brought to the notice of the court at the time of decision of the earlier writ petition. The order on review petition was passed after providing an

opportunity of hearing to the appellant. Since the appellant suppressed this material fact from this court at the time of decision of the earlier writ petition, he disentitled himself to grant of any relief.

The appellant filed a rejoinder to the aforesaid reply in which he contended that respondents Nos. 1 to 3 never conveyed to him the decision of his review petition dated 4.10.1978. The respondent No.4 in his reply has not even disclosed the source of knowledge about rejection of review petition and the date on which he got this information. It was however asserted that no communication whatsoever was sent to the appellant regarding decision of the review petition on 4.10.1978. It was, therefore, prayed that writ petition be allowed in terms of the prayers made therein.

The learned single Judge by his judgment dated 19.10.1995 dismissed the writ petition holding that grant of lease deed in favour of respondent No.4 cannot be considered as unreasonable or against public interest. Feeling aggrieved by the aforesaid judgment, the appellant has preferred the

present appeal.

We have heard Shri B.L. Purohit Advocate assisted by Shri J.L. Purohit Advocate for the appellant, Shri Rameshwar Dave, Deputy Government Advocate for respondents no. 1 to 3 and Shri R.S. Saluja for contesting respondent No.4 and perused the record.

Shri B.L. Purohit while reiterating the arguments raised in the writ petition submitted that according to rule 23 of the Rules of 1974, the Municipal Council was required to have put the disputed strip of land to auction rather than leasing it out to respondent No.4 for 99 years. Learned counsel argued that rule 23 of the Rules of 1974 categorically provides that small strips of land which are not fit to be disposed of as plots shall be sold to the owner of the adjoining plot at the market value to be calculated keeping in view the prevailing price of land. Where there are two or more persons interested in strip of land, auction shall be held only between those whose plots or buildings adjoins the strip of land provided that before auctioning such strip of land a public notice shall be issued.

Learned counsel argued that the proposal of the Municipal Council for leasing out the strip of land to respondent No.4 was turned down by the State Government not once but consecutively on three occasions by orders respectively passed on 17.1.1966, 26.9.1967 and 5.1.1971 and in last two orders a positive direction was given to the Municipal Council to put the strip of land to auction. The State Government passed these orders in exercise of its power conferred upon it by section 80(2) of the Act of 1959 and did not thereafter have any power of reviewing its previous orders. The subsequent order of the government dated 27.1.1978 permitting grant of lease for 99 years in favour of respondent No.4 was thus passed without the authority of law. The said order is therefore liable to be quashed and the writ petition deserves to be allowed.

Learned counsel for the appellant argued that the learned single Judge did not correctly appreciate the ratio of the judgment of the Hon'ble Supreme Court in the case of M/s Kasturi Lal Vs. State of J&K, reported in AIR 1980 SC page

1992. Learned counsel reiterated his reliance on the aforesaid judgment for the proposition that the Government cannot act in a manner which would benefit a private party at the cost of the state and further that such action of the Government is both unreasonable and contrary to the public interest. Reliance in particular was placed on those observations of the Hon'ble Supreme Court where it was held that the Government cannot give a contract or sale or lease out its property for a consideration less than the highest that can be obtained for it unless, of course, there are other consideration which render it reasonable and in public interest to do so. In the present case, the learned counsel argued that there was no such over-riding consideration as to require the authorities to deviate from the normal rule of auction particularly when the Government by its earlier orders dated 26.9.1967 and 5.1.1971 had directed the Municipal Council to adhere to such rules and put the strip of land to auction. Learned counsel explained with the help of site plan that the disputed plot if allotted to the appellant by way of auction would make his land into an even size plot of rectangular shape which apparently gives a look of being an

integral part of his plot, whereas if this strip of land is being given to respondent No.4 it would be giving 'L' shape to both the plots. It was therefore argued that the appellant had a better claim than the respondent No.4 even from this point of view. It was argued that the appellant did not receive any communication about decision of his review petition by order dated 4.10.1978, therefore, there was no question of concealing the said order from this court. The writ petition earlier filed by appellant was disposed of on 19.12.1984 with the direction to the authorities to dispose of the review petition within six months. If the appellant had known from before that the review petition already stood decided on 4.10.1978, there was no reason why the appellant would not have disclosed such order to this court at the time of decision in earlier writ petition. When the appellant did not receive any communication deciding his review petition even after six months in his earlier writ petition that he was constrained to file fresh writ petition. Learned counsel, therefore, prayed that the impugned order dated 27.1.1978 be quashed and set-aside and the judgment passed by the learned single Judge be also

set-aside.

On the other hand, Shri Rameshwar Dave, learned Deputy Government Advocate for the respondents no. 1 to 3 and Shri R.S. Saluja, learned counsel for the respondent No.4 supported the judgment of the learned single Judge. Shri R.S. Saluja, learned counsel for respondent No.4 in particular argued that review petition of the appellant was already decided on 4.10.1978, therefore, it was his bounden duty to have informed this court about the same when his earlier writ petition was pending. It was argued that the impugned order was passed by the Government in favour of the respondent No.4 as far back as 27.1.1978 whereas the writ petition challenging its validity has been filed enormously delayed on 12.5.1986. He argued that Municipal Council in its meeting held on 30.6.1965 by passing a resolution decided to regularize the possession of respondent No.4 in the spirit of compromise and settlement. It was a conditional resolution whereby respondent No.4 was required to pay cost of litigation as also to withdraw the pending civil suit filed on the same subject matter. Even if the Government at one point of time declined to grant of lease

in favour of respondent No.4, it cannot be said to have divested of its power in approving the lease deed particularly in view of possession of respondent No.4 over the land in dispute since early sixties. It was argued that respondent No.4 was still in possession of the land in dispute and therefore the order dated 27.1.1978 which seeks to regularize such prolonged possession by way of lease for year 99 years cannot be said to be without the authority of law.

It was argued that earlier three orders whereby the Government declined to approve of lease in favour of respondent No.4 were all passed without affording an opportunity of hearing to respondent No.4 and, therefore, on his representation if subsequent order of approval has been passed on 27.1.1978, such order cannot be described as being illegal. Learned counsel argued that although the normal rule in the case of sale of strip of land when there are two or more claimants is by way of auction, but deviation from such rule in the present case was solely made by the Government for two reasons firstly because of the possession of respondent No.4

over the land in dispute dates back to early sixties and secondly the Rules of 1974 incorporating rule 23 regarding auction came into force much later in point of time than the resolution dated 30.6.1965 was passed by the Municipal Council. Learned counsel argued that setting aside order dated 27.1.1978 at this stage would result into revival of those illegal orders which were passed without hearing the respondent No.4. It was further argued that the government even after refusing to approve earlier resolution of the Municipal Council could later by invoking provisions of Section 300 of the Act of 1959 direct execution of lease of subject plot in favour of the respondent no. 4. It was therefore argued that the judgment passed by the learned single Judge does not suffer from any legal infirmity. Special appeal be therefore dismissed with costs.

We have bestowed our earnest consideration to the rival arguments and perused the record.

What transpires from examination of record is that possession of respondent No.4 over the strip of land in dispute

was considered by the Municipal Council as an encroachment. It was, therefore, that when the appellant submitted representation on 23.12.1962 to the Administrator of the Municipal Council, Sriganganagar, he directed for removal of the encroachment through municipal staff so that the land could be put to auction. The resolution of the Municipal Council passed on 30.6.1965 was also conditional one whereby the respondent No.4 was required to withdraw the civil suit filed on the same subject matter acknowledging the fact of illegal encroachment of respondent No.4 over the land in dispute. This proposal however was turned down by the Government vide its communication dated 17.1.1966 which was addressed to Chairman of the Municipal Council, Sriganganagar. When the matter was yet again referred to Government, it again rejected the proposal by its order dated 26.9.1967 and directed the Administrator of the Municipal Council Sriganganagar to put the disputed land to auction as per rules. When the matter was again moved to the Government, it finally by its order dated 5.1.1971 directed that there were already rules in regard to sale of strip of land according to which if more than one

persons desire to purchase such land, sale should be made only by way of auction. It was, therefore, directed that the subject land should be put to auction.

It should be noted that section 80(1) of the Act of 1959 contains for the provisions relating to transfer of property and contracts by the Municipalities. It provides that every Board shall be competent, subject to prescribed restrictions and conditions, to lease, sale or otherwise transfer any movable or immovable property belonging to it including the Municipal land as also any Government land and so far as it is not inconsistent with the provisions and purpose of this Act and the Rules made thereunder to enter into and perform all such contracts as may appear necessary or expedient in order to carry into effect the said provisions and the purposes. Sub-section (1) supra is subject to two provisos namely (i) no such lease, sale, transfer and contracts shall be binding on the Board unless it was in conformity with the provisions of the Act and the Rules made thereunder; and (ii) no lease, sale transfer or any other contract respecting any government land shall be

valid unless it is confirmed by the prescribed authority in the prescribed manner and on the prescribed conditions. Sub-section (2) of section 80 provides that the State Government or any officer authorized by it in this behalf may for the purpose of satisfying as to correctness, legality or propriety of any proposal to lease, sale or transfer of any Government land made by or on behalf of the Board or by any Member, Chairman, Vice Chairman or officer of a Board, call for the relevant record and may while doing so direct that pending examination of the matter, the proposal to lease, sale or transfer of the Government land shall remain in abeyance and no action in furtherance thereof shall be taken till decision of the State Government or the aforesaid officer under sub-section 2(b). Sub-section 2(b) of section 80 further provides that if on further examination of the record and after giving to the person interested in such proposal a reasonable opportunity of being heard, the State Government or the officer authorized as aforesaid, is satisfied that the proposal to lease, sale or transfer the Government land is not in accordance with or in contravention of the provisions of this Act, it may by order

published in the official gazette modify, cancel or rescind wholly or in part, the proposal made for lease, sale or transfer of the Government land or any action, proceeding taken in pursuance thereof or may give any other direction as it may deem proper. Sub-section (3) of section 80 has given the consequences of the possession of a person in pursuance of any lease, sale, transfer or any other contract if eventually the same is not approved of by the Government and it provides that such person in that eventuality shall be deemed to be in unauthorized occupation within the meaning of Rajasthan Public Premises (Eviction of Unauthorized Occupants) Act, 1965 and liable to be evicted.

Critical examination of the scheme of Section 80 would show that the two provisos of sub-section (1) thereof provides that no lease, sale, transfer and contract shall be binding on the Board unless it is in conformity with the provisions of the Act and the Rules made thereunder and it further provides that no lease, sale, transfer or any other contract respecting any Government land shall be valid unless it is confirmed by the prescribed authority in the prescribed

manner on the prescribed conditions. Sub-section (2) of section 80 confers the power on the State Government or any other officer authorized by it to call for the record so as to examine the correctness, legality or propriety of any proposal to lease, sale or transfer of any government land made by or on behalf of the Board. This sub-section in its clause (b) further provides that if the Government or the officer authorized by it is satisfied that the proposal to lease, sale or transfer the Government land is not in accordance with or in contravention of the provisions of this Act, it may modify, cancel or rescind wholly or any part of such proposal. The power conferred upon the Government under section 80(2) of the Act are analogous to the power which are available to the Government or any other authority authorized in this behalf by the Government under section 300 of the Act albiet for purposes other than those specifically provided for in Section 80 of the Act. In the present case, resolution of the Municipal Council dated 30.6.1965 was forwarded to the Government for its approval. The Government cancelled/rescinded the resolution of the Board proposing lease of the disputed land in favour of the respondent No.4 which

clearly implied that it did not confirm the proposed lease. It was thereafter that the Government again on being approached directed the Municipal Council by its order dated 26.9.1967 to put the land in dispute to auction as per rules. When the matter was again brought before it, the Government again by order dated 5.1.1977 directed the Municipal Council to put the land to auction as per the rules on the subject which provided that in the event of two or more persons claiming the strip of land, it should be put to auction. When the Government had already arrived at a satisfaction under section 80(2) about the proposed lease in favour of respondent No.4 being, not in accordance with or in contravention of the provisions of the Act and had therefore cancelled/rescinded the proposal and reiterated the same by repeatedly inviting attention of the Municipal Council to the rules for putting such plot to auction, we cannot accept the argument that the Government could legitimately pass the order dated 27.1.1978 in exercise of its power under section 300 of the Act. The order under section 80(2) having already been passed which is a provision analogous to section 300 supra, the Government had already

exhausted its revisional power under the said provision. No further power of review then was available with the Government to revive a cancelled/rescinded resolution of the Municipal Council thereby approving the lease deed in favour of respondent No.4. We cannot accept the argument of learned counsel for the respondent no. 4 that the power under section 300 of the Act would be available to the Government against its own order passed under section 80(2) of the Act. This is for the simple reason that revision petition against the order of the Government could not be again laid before the Government itself in regard to which it had already passed an order under an analogous provision like section 80 of the Act. The order dated 27.1.1978 in our view is without the authority of law.

Apart from the competence of the Government, another reason which impel us to annul the impugned order is that section 80 clearly provides that the proposed lease, sale, transfer and contract respecting any Government land has to be in conformity with the provisions of the Act and the rules made thereunder. The Government orders dated 26.9.1967

and 5.1.1977 pointedly drew attention of the Municipal Council to the rule which provided that in the event of two or more persons being interested in a strip of land, the only mode of its sale was by way of auction. Such a provision was in any case available in rule 23 of the Rules of 1974 when the Government passed the order dated 27.1.1978. Sub-rule (2) of rule 23 in this connection clearly provides that where two or more persons are interested in the strip, there shall be auction only between those whose plots or buildings adjoins the strip of land. It is trite law that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the provisions of the Act and the Rules framed thereunder are so acting as a creature of the Statute and they must act within the four corners thereof. When the Rules framed under the authority of the Act provided to put a strip of land to auction in the event of there being more than one claimants, such a rule cannot be deviated from and the only available mode of disposal of the strip of land in that situation should be by way of auction.

We also cannot countenance the argument advanced by the learned counsel for the respondent No.4 that since the earlier orders were passed by the Government without providing to him an opportunity of hearing and therefore setting aside the order dated 27.1.1978 would result into revival of an illegal order. In the first place, what was done by the State Government by order dated 17.1.1966 was to cancel/rescind the resolution of the Board in exercise of its statutory power under section 80 of the Act, therefore, not providing an opportunity of hearing to respondent No.4 would by itself be not fatal to legality of the said order. Secondly, when we are satisfied that the requirement of rule on the subject was putting the strip of land to auction, there being two claimants thereof, relegating the matter back to the authorities for completing mere ritual of hearing now by setting aside the subsequent order dated 27.1.1978 would not return any other result except this. Therefore, the grievance of respondent No.4 for not being provided opportunity of hearing would have to be tested on the touch stone of prejudice and the principle of natural justice in an eventuality like this would

have to be curtailed by applying the principle of law of recent origin which has now come to be known as the "doctrine of useless formality". No prejudice in our view was caused to the respondent no. 4 when the Government by its earlier orders dated 26.9.1967 and 5.1.1971 required the Municipal Council to put the strip of land to auction, as that was the requirement of law. Thirdly, the fallacy of argument should be evident from the fact that what is being examined in the present appeal is not the validity of the orders dated 26.9.1967 and 5.1.1971 which required the Municipal Council to put the strip of land to auction but it is the order dated 27.1.1978 whereby the direction was issued by the Government to the Municipal Council for leasing out the strip of land in favour of the respondent No.4. The respondent No.4 having not challenged earlier orders dated 26.9.1967 and 5.1.1971 before any legal forum known to the law, the argument of not providing him opportunity of hearing now at this stage would not be available to him in the present proceedings. We do not find any merit in this argument advanced on behalf of respondent No.4 either and therefore reject the same.

We are also not persuaded to accept the argument of respondent No.4 that the writ petition filed by the appellant on 12.5.1986 should be dismissed on the ground of delay and latches because the appellant had already challenged the order dated 27.1.1978 originally in his earlier Writ Petition No. 473/1978 which was decided by this court under its judgment dated 19.12.1984 with the direction to the authorities to decide the review petition. There was no question for the appellant to have secured such an order from this court by concealing the fact with regard to decision of his review petition already made on 4.10.1978 as this was not an order in his favour but rather against him. In the circumstances, the writ petition of the appellant did not suffer from delay and latches.

In the result, the judgment passed by the learned single Judge dated 19.10.1995 is set aside and the order of the Government dated 27.1.1978 is quashed and set-aside and consequently the writ petition of the appellant stands allowed and the respondents are directed to hold auction of the land in question within a period of three months from the date of

receipt/service of copy of this judgment in accordance with provisions of Rule 23 of the Rules of 1974. In the facts of the case, we leave the parties to bear their own cost.

(MOHAMMAD RAFIQ),J. **(S.N.JHA),C.J.**

Aditya/-